

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

STEVEN K. ZINNEL,

Plaintiff,

v.

CITIMORTGAGE, INC., a New York  
Corporation; CR TITLE SERVICES,  
INC., a Delaware Corporation;  
and DOES 1 through 100,  
inclusive,

Defendants.

2:10-cv-02406-GEB-DAD

ORDER DENYING PLAINTIFF'S  
APPLICATION FOR A TEMPORARY  
RESTRAINING ORDER

On September 9, 2010, Plaintiff Steven K. Zinnel, proceeding *in propria persona*, filed an ex parte application for a temporary restraining order ("TRO") and preliminary injunction in which he seeks to enjoin the non-judicial foreclosure sale of his home, which is scheduled to occur on September 22, 2010. However, "[t]he court may issue a preliminary injunction only on notice to the adverse party." Fed. R. Civ. Pro. 65(a)(1). Plaintiff declares he "inform[ed] [Defendants that Plaintiff would be bringing the instant Application and Motion," and that a copy of the "fax/email is attached [to his declaration] as Exhibit 31." (Decl. Supp. Mot. TRO "Decl." ¶ 6.) Exhibit 31 is not attached to Plaintiff's Declaration, however, Exhibit 28 appears to be a copy of the notice Plaintiff sent. (Id. Ex. 28.)

Exhibit 28 does not indicate whether or not Plaintiff provided Defendants with a copy of his application; it appears that Plaintiff only informed them he would be seeking an injunction.

For the reasons stated below, Plaintiff's TRO application is DENIED.

### I. LEGAL STANDARD

"Temporary restraining orders are governed by the same standard applicable to preliminary injunctions." Pimentel v. Deutsche Bank Nat. Trust Co., No. 09-CV-2264 JLS (NLS), 2009 WL 3398789, at \*1 (S.D. Cal. Oct. 20, 2009); see also Stuhlberg Intern. Sales Co., Inc. v. John D. Brushy and Co., Inc., 240 F.3d 832, 839 n.7 (9th Cir. 2001) (stating the standards for issuing a TRO are "substantially identical" to those for issuing a preliminary injunction). Therefore, "[a] plaintiff seeking a [TRO] must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Am. Trucking Ass'n, Inc. v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting Winter v. Natural Res. Def. Council, Inc., --- U.S. ---, 129 S. Ct. 365, 374 (2008)). "A preliminary injunction is appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." Alliance for the Wild Rockies v. Cottrell, --- F.3d ---, 2010 WL 2926463, at \*7 (9th Cir. 2010). A TRO is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." Winter, 129 S. Ct. at 376.

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## II. BACKGROUND

Plaintiff declares that in October 1995, Plaintiff and his now ex-wife purchased the real property located at 11966 Old Eureka Way, Gold River, California 95670 (the "Property"). (Decl. ¶ 18.) Plaintiff and his ex-wife executed a Promissory Note to borrow \$294,550.00 plus interest at the fixed rate of 8.25 percent from Commerce Security Bank (the "Note"). (Id. Ex. 1.) The Note was secured by a Deed of Trust which was recorded in the Official Records in the Office of the Recorder of Sacramento County, California on October 27, 1995 ("Bank Deed of Trust"). (Id. Ex. 2.) The Bank Deed of Trust lists the beneficiary as the Commerce Security Bank and "its successors and/or assigns" and the trustee as the Stewart Title Guaranty Company. (Id.)

Plaintiff declares "as part of his marriage dissolution proceeding," he was awarded sole ownership of the Property. (Id. ¶ 20.) An Interspousal Transfer Deed was recorded on April 8, 2002. (Id. Ex. 3.) The same day Plaintiff executed a Promissory Note to borrow \$80,000.00 from Derian Eidson and secured the loan with a Deed of Trust which was recorded on April 8, 2002, making it junior to the Bank Deed of Trust. (Id. ¶¶ 22-23; Ex. 4.)

Plaintiff declares "[i]n January 2009, [he] "began to experience severe financial problems, making it increasingly difficult for him to make the payment on the [Note]." (Id. ¶ 28.) Plaintiff declares he repeatedly contacted Defendant CitiMortgage Inc. ("Citi") and attempted to reduce his monthly mortgage payments and modify his loan. (Id. ¶¶ 33-56.)

On May 25, 2010 an Assignment of the Bank Deed of Trust was recorded (the "Assignment"). (Id. Ex. 5.) The Assignment was signed by Lisa Markham, listed as the Assistant Vice President of "DEUTSCHE BANK

1 NATIONAL TRUST COMPANY AS TRUSTEE F/K/A BANKERS TRUST COMPANY OF  
2 CALIFORNIA, N.A. SUCCESSOR TRUSTEE BY OPERATION OF LAW TO BANK OF  
3 AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, SUCCESSOR BY MERGER TO  
4 SECURITY PACIFIC NATIONAL BANK AS TRUSTEE BY CITIMORTGAGE, INC., AS  
5 SERVICING AGENT" and granted, assigned, and transferred to Citi all  
6 beneficial interest under the Bank Deed of Trust. (Id.) The same day a  
7 Substitution of Trustee was recorded, also executed by Lisa Markham,  
8 that substituted CR Title Services Inc. for Stewart Title of California  
9 as Trustee. (Id. Ex. 6.)

10 Plaintiff declares he "believes that Deutsche Bank National  
11 Trust Company . . . have never had a beneficial interest in the [Bank  
12 Deed of Trust] [or] . . . the ability to grant, assign, or transfer to  
13 CITI[;] . . . that Lisa Markham was not the Assistant Vice President of  
14 Deutsche Bank[;]" and therefore, the Assignment and Substitution of  
15 Trustee are "invalid as a matter of law." (Id. ¶¶ 58- 59, 60, 64.)

16 A Notice of Default was recorded on May 25, 2010, the content  
17 of which includes the statements: Plaintiff owed \$34,472.16 in past due  
18 payments plus costs and expenses, as of May 20, 2010; "When [the Notice  
19 of Default is] recorded mail to: CR Title . . . ." (Id. Ex. 7.)  
20 Plaintiff declares he "believes that CR Title is not authorized by the  
21 beneficiary of the [Bank Deed of Trust] to record the [Notice of  
22 Default]." (Id. ¶ 66.) Plaintiff also declares he "believes that actual  
23 notice of the [Notice of Default] was not given to junior lien holder  
24 [Eidson] as required by California Civil Code 2924b(c)(1)[;]" and that  
25 the Notice of Default "is invalid as a matter of law." (Id. ¶¶ 67-68.)

26 Plaintiff declares after he became aware of the Notice of  
27 Default, he continued his efforts to stop the foreclosure by calling and  
28 writing letters to "numerous employees and executives of CITI, GMAC

1 Residential Funding corporation, and their attorneys." (Id. ¶ 71.)  
2 Plaintiff sent multiple letters requesting documents he believed the  
3 Notice of Default specified he was entitled to, including the  
4 reinstatement amount and the Deed of Trust on which Citi was  
5 foreclosing. (Id. ¶¶ 72, 74, 80.) The Notice of Default states: "[u]pon  
6 your written request, the beneficiary or mortgagee will give you a  
7 written itemization of the entire amount you must pay." (Id. Ex. 7.)

8         On August 20, 2010, Citi sent Plaintiff a letter responding to  
9 his requests and included an incorrect Deed of Trust for a property in  
10 Orange County, California. (Id. Ex. 15-16.) The Orange County Deed of  
11 Trust is not in Plaintiff's name and refers to an entirely different  
12 property. (Id. Ex. 16.) However, Plaintiff has the correct Deed of  
13 Trust. (Id. Ex. 2.) The letter informed Plaintiff that loan modification  
14 documents were delivered to him on April 9, 2010, and Plaintiff returned  
15 them to Citi signed, but failed to provide Citi "with the \$2, 404.98  
16 payment that was due in conjunction with the returned documents." (Id.  
17 Ex. 15.) This Citi communication also states: "A payment history and a  
18 Schedule detailing the \$41,917.45 of arrears on [Plaintiff's] account.  
19 Please be advised this is not a reinstatement amount due. Additional  
20 fees and costs may apply." (Id. Ex. 7.) In a letter dated August 24,  
21 2010, Citi informed Plaintiff that the reinstatement amount, good  
22 through August 31, 2010, was \$43,400.63. (Id. Ex. 17.) Plaintiff  
23 "dispute[s] that CITI is owed \$43,400.63" and, based on his own  
24 calculations, believes that the beneficiary of the Note is owed  
25 \$27,759.88. (Id. ¶¶ 83, 86.)

26         A Notice of Trustee's Sale was recorded on August 26, 2010, in  
27 which the date of sale is September 22, 2010. (Id. Ex. 8.) Plaintiff  
28

1 declares he sent a check to Citi for \$27,759.88 on September 3, 2010,  
2 which is the amount he believes he owes. (Id. ¶ 87, Ex. 19-21.)

### 3 **III. DISCUSSION**

4 Plaintiff argues he is entitled to a TRO enjoining the  
5 trustee's sale because Defendants are mistaken about the current amount  
6 due under the Note, and that the Assignment of the Bank Deed of Trust,  
7 Substitution of Trustee, Notice of Default, and Notice of Trustee's Sale  
8 are invalid. Further, Plaintiff argues that Defendants did not give  
9 proper notice to the junior lien holder, provide Plaintiff with the  
10 documents required by law, or comply with California Civil Code section  
11 2924. (Pl.'s Mot. TRO "Mot." 6:6-14.) Plaintiff's arguments appear to  
12 concern the claim in his Complaint in which he alleges a "Wrongful  
13 Foreclosure (Negligence per Se)" under California Civil Code section  
14 2924. (Compl. 19:2-3, 15.) Although Plaintiff has several claims in his  
15 Complaint, the only claim on which he appears to focus in his TRO  
16 application is his wrongful foreclosure claim.

17 "Wrongful foreclosure is an action in equity, where a  
18 plaintiff seeks to set aside a foreclosure sale that has already  
19 occurred. Because plaintiff's house has not yet been sold, a claim for  
20 wrongful foreclosure is not yet ripe." Foster v. SCME Mortg. Bankers,  
21 Inc., No. CIV. 2:10-518 WBS GGH, 2010 WL 1408108, at \*4 (E.D. Cal. Apr.  
22 7, 2010) (citations omitted). Even if the likelihood of Plaintiff's  
23 success on this claim should be addressed, Plaintiff has not shown he is  
24 likely to succeed on this claim. Although Plaintiff mentions several  
25 arguments that are not pertinent to this claim, they are woefully  
26 insufficient to support his request for injunctive relief.

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1 **A. Likelihood of Success on the Merits**

2 "[T]he power of sale exercised by the trustee on behalf of the  
3 lender/creditor in nonjudicial foreclosures is a right authorized solely  
4 by the contract between the lender and trustor as embodied in the deed  
5 of trust." Garfinkle v. Superior Court, 21 Cal. 3d 268, 277 (1978)  
6 (citations omitted). However, the California legislature has  
7 established "certain minimum standards for conducting nonjudicial  
8 foreclosures . . . ." Id. at 278. California Civil Code sections 2924  
9 through 2924k "provide a comprehensive [statutory] framework for the  
10 regulation of a nonjudicial foreclosure pursuant to a power of sale  
11 contained in a deed of trust." Moeller v. Lien, 25 Cal. App. 4th 822,  
12 830 (1994). The Moeller court described this statutory scheme as  
13 follows:

14 Upon default by the trustor, the beneficiary may  
15 declare a default and proceed with a nonjudicial  
16 foreclosure sale. The foreclosure process is  
17 commenced by the recording of a notice of default  
18 and election to sell by the trustee. After the  
19 notice of default is recorded, the trustee must  
20 wait three calendar months before proceeding with  
the sale. After the 3-month period has elapsed, a  
notice of sale must be published, posted and mailed  
20 days before the sale and recorded 14 days before  
the sale. The trustee may postpone the sale at any  
time before the sale is completed.

21 Id. (citations omitted).

22 Plaintiff's arguments regarding why the notices he was given  
23 were defective are supported by his declaration in which he declares "he  
24 believes" what he opines is true. However, in light of the context in  
25 which Plaintiff states what he believes, his "belief" statements are  
26 "entitled to no weight because [Plaintiff has not shown he has] personal  
27 knowledge" of the matters on which he has given opinions prefaced with  
28 the word "believe." Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1412 (9th  
Cir. 1995); Cermetek, Inc. v. Butler Avpak, Inc., 573 F.2d 1370, 1377

1 (9th Cir. 1978)(equating "I understand" statement in affidavit to  
2 inadmissible "I believe" statements despite a general averment that the  
3 affiant had personal knowledge at beginning of the affidavit); Pace v.  
4 Capobianco, 283 F.3d 1275, 1279 (11th Cir. 2002)("The district court's  
5 treatment of the 'believe' portion of Hedge's statement in his  
6 affidavit-that Hedge 'observed motion in the red car which I believe was  
7 [Davis] raising his hands towards the roof of his car in an attempt to  
8 surrender'-as sufficient to create a fact issue about raised hands was  
9 error."). The quality of the evidence presented is germane to the  
10 determination of which side is likely to prevail.

11 Plaintiff argues that the Assignment and Substitution of  
12 Trustee were invalid because he believes Lisa Markham was not the  
13 Assistant Vice President of the transferring bank and that the  
14 transferring bank never had a beneficial interest under the Bank Deed of  
15 Trust. (Mot. 12:12-13:8.) Plaintiff argues consequently the Notice of  
16 Default and Notice of Trustee's Sale were invalid because they do not  
17 list an authorized beneficiary of the Bank Deed of Trust. (Id. 13:9-16,  
18 14:17-18.)

19 Under California Civil Code section 2924(a)(1), a "trustee,  
20 mortgagee or beneficiary or any of their authorized agents" may conduct  
21 the foreclosure process. Under California Civil Code section  
22 2924b(b)(4), a "person authorized to record the notice of default or the  
23 notice of sale" includes "an agent for the mortgagee or beneficiary, an  
24 agent of the named trustee, any person designated in an executed  
25 substitution of trustee, or an agent of that substituted trustee." Since  
26 Plaintiff offers nothing but his unsupported "belief" that Citi is not  
27 a beneficiary of the Bank Deed of Trust, and conclusory assertions  
28 unsupported by facts concerning the validity of the Assignment and



1 Substitution of Trustee, Plaintiff lacks sufficient evidentiary support  
2 for his contentions.

3 Plaintiff also argues the Notice of Default is invalid because  
4 a copy of it was not sent to the junior lien holder pursuant to  
5 California Civil Code section 2924b(c)(1). (Mot. 13:17-18.) California  
6 Civil Code section 2924b(c)(1)-(2)(B) prescribes:

7 The mortgagee, trustee, or other person authorized to  
8 record the notice of default or the notice of sale shall  
9 do the following . . . Within one month following  
10 recordation of the notice of default, deposit or cause to  
11 be deposited in the United States mail . . . a copy of  
the notice . . . . [to] [t]he beneficiary or mortgagee of  
any deed of trust or mortgage recorded subsequent to the  
deed of trust or mortgage being foreclosed . . . .

12 Plaintiff has not shown that he has standing to raise this  
13 issue on behalf of the junior lien holder. Therefore, even if Citi  
14 failed to give the junior lien holder Notice of Default as Plaintiff  
15 argues, nothing in the record shows Plaintiff has standing to litigate  
16 this matter.

17 Further, Plaintiff argues Citi has refused to provide him  
18 with documents that it is "required to provide under the law, including  
19 the reinstatement amount." (Mot. 13:23.) Plaintiff also argues Citi was  
20 required to provide a copy of the Bank Deed of Trust that "gives CITI  
21 the right to foreclose on the [Property]." (Id. 14:1-2.) However, the  
22 evidence Plaintiff presents shows Citi sent Plaintiff the documents and  
23 information he desires. Citi states in its August 20, 2010 letter that  
24 it sent Plaintiff the following: a history and schedule detailing the  
25 arrears on Plaintiff's account, Plaintiff's Promissory Note, and the  
26 Deed of Trust. (Decl. Ex. 15.)

27 Plaintiff also argues he has tendered all amounts he believes  
28 are currently due under the Note. (Mot. 16:23-24.) However, this  
argument is only supported by Plaintiff's "belief" regarding what he

1 owes, and this evidence is insufficient to show that Plaintiff's  
2 "belief" about what he owes is the total arrearage.

3 Therefore, Plaintiff has not shown he is likely to succeed on  
4 the merits of his "Wrongful Foreclosure (Negligence per Se)" claim.

### 5 **B. Irreparable Harm**

6 Plaintiff argues he will suffer irreparable harm absent the  
7 issuance of a TRO since "Plaintiff will lose his and his children's  
8 family home." (Mot. 18:13-14.) "Clearly, loss of a home is a serious  
9 injury." Alcaraz v. Wachovia Mortg. FSB, 592 F. Supp. 2d 1296, 1301  
10 (E.D. Cal. 2009). "However, whether a particular foreclosure constitutes  
11 irreparable harm turns in part on the reasons for foreclosure."  
12 Mandriques v. World Sav., Inc., No. C 07-4497 JF (RS), 2009 WL 160213,  
13 at \*3 (N.D. Cal. 2009) (citing Parker v. United States Dep't of Agric.,  
14 879 F.2d 1362, 1367-68 (6th Cir. 1989)). Here, Plaintiff has not  
15 provided a sufficient explanation why he is in his present predicament.  
16 The record indicates that an attempt has been made to help him keep his  
17 home, but he "failed to cooperate." Parker, 879 F.2d at 1368. Since  
18 Plaintiff has not shown that the irreparable harm he argues he will  
19 experience is caused by Defendants, this injunction factor does not  
20 favor granting Plaintiff's TRO request.

### 21 **C. The Balance of Equities and the Public Interest**

22 "The final two inquiries germane to an analysis of a TRO  
23 request are whether the balance of equities tips in Plaintiff's favor  
24 and whether the public interest will benefit from the proposed  
25 injunction. These factors may be viewed together." Saba v. Caplan, No.  
26 C 10-02113 SBA, 2010 WL 2681987, at \*5 (N.D. Cal. July 6, 2010) (citing  
27 Independent Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly, 572 F.3d 644,  
28 657-58 (9th Cir. 2009)).

1 Plaintiff argues the balance of equities and the public  
2 interest favor issuance of a TRO because "Defendants suffer nothing by  
3 preserving the status quo and allowing Plaintiff to remain in [his] home  
4 until this matter is determined on the merits." (Mot. 18:16-17.)

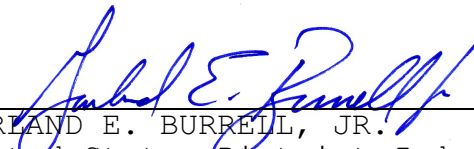
5 While "the potential loss of Plaintiff's home through  
6 foreclosure generally presents a hardship that weighs in [Plaintiff's]  
7 favor[,]" since Plaintiff has not shown he did not create the hardship  
8 he is experiencing, this factor does not weigh in Plaintiff's favor.  
9 Saba, 2010 WL 2681987, at \*5.

10 Further, Plaintiff has failed to explain why the public  
11 interest favors injunctive relief which would halt a trustee's sale that  
12 Plaintiff has not shown fails to comply with the applicable statutory  
13 framework. Therefore, this factor has not been shown to weigh in his  
14 favor.

#### 15 IV. Conclusion

16 For the stated reasons, Plaintiff's application for an ex  
17 parte TRO is DENIED.

18 Dated: September 15, 2010

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22 GARLAND E. BURRELL, JR.  
23 United States District Judge  
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